



Business Regulation Committee

**Tuesday, February 7, 2006
9:45 AM - 11:45 AM
Reed Hall**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Business Regulation Committee

Start Date and Time: Tuesday, February 07, 2006 09:45 am

End Date and Time: Tuesday, February 07, 2006 11:45 am

Location: Reed Hall (102 HOB)

Duration: 2.00 hrs

Consideration of the following bill(s):

HB 247 Beverage Law by Bogdanoff

HB 647 Violent Video Games by Baxley

NOTICE FINALIZED on 01/27/2006 15:30 by REFFITT.NIKKI

HOUSE OF REPRESENTATIVES STAFF ANALYSIS



BILL #: HB 647

Violent Video Games

SPONSOR(S): Baxley

TIED BILLS:

IDEN./SIM. BILLS: SB 492

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Business Regulation Committee		Watson 	Liepshutz 
2) Judiciary Committee			
3) Judiciary Appropriations Committee			
4) Commerce Council			
5) _____			

SUMMARY ANALYSIS

This bill prohibits a person from selling or renting a violent video game to a minor or allowing a minor to play a violent video game in a video arcade. This bill requires that any violent video game imported or distributed in Florida must display a specific label.

This bill authorizes a county, municipality, the attorney general, the Department of Legal Affairs or any person aggrieved by a violation to seek injunctive relief and imposition of civil penalties against the violator. Additionally, this bill makes a violation of the act a second degree misdemeanor, and a second or subsequent violation a first degree misdemeanor.

This bill does not have a significant fiscal impact.

This bill presents issues related to the First Amendment of the United States Constitution. See section III A for further discussion.

This bill provides for an effective date of October 1, 2006.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Personal Responsibility: This bill creates civil and criminal penalties for the previously legal activities.

Empower Families: The bill prevents children from accessing violent video games without the aid of a person over the age of eighteen.

B. EFFECT OF PROPOSED CHANGES:

Current Situation

Currently, Florida law prohibits the sale of harmful materials to minors. A minor is defined as a person under the age of eighteen¹, and "harmful to minors" as:

[A]ny reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.²

Further, Florida law makes it a third degree felony for a person to knowingly sell, rent, or loan for monetary consideration material to a minor if the material is:

[A] picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors.³

Florida law, through a similar statute,⁴ makes the same conduct a first degree misdemeanor.⁵

Under current law, it appears that the sale or rental of a video game to a person under 18 years old could be charged as a violation of either statute, if the video game includes visual representation or images of nudity or certain types of sexual conduct and is harmful to minors. However, there is no current prohibition against the sale or rental of video games containing representations or images of nonsexual violence.

Although it is not required by law, many commercially-distributed video games display content and suitability ratings on the cover. The Entertainment Software Ratings Board (ESRB) of the Entertainment Software Association (ESA), rates video games by content and age-appropriateness. In addition to the age-appropriateness rating, the ESRB system includes content descriptors such as "blood and gore," "intense violence," and "strong sexual content."

¹ Section 847.001(8), F.S.

² Section 847.001(6), F.S.

³ Section 847.012(2)(a), F.S.

⁴ Section 847.013(2)(b), F.S.

⁵ Section 847.0013(2)(f), F.S.

The American Amusement Machine Association has drafted ratings for coin-operated arcade machines that provide information to consumers analogous to the information provided by the ratings established by the Entertainment Software Rating Board for home video games. It is not age based and uses color-coded Parental Advisory Disclosure Messages to alert players to game content.

Effect of Proposed Changes

This bill creates an unnumbered section of the Florida Statutes to provide that violent video games may not be sold or rented to minors. Additionally, the section provides that a minor may not be permitted to play a violent video game at a video arcade if the video game has been labeled as violent. This section also provides definitions for terms specific to the act such as "Violent video game" and "serious physical abuse." This section provides an affirmative defense to a person who is shown evidence that the player of the video game was not a minor or that the manufacturer failed to label a violent video game as required by this section. A violent video game may be sold or rented to a minor's parent, grandparent, aunt, uncle or legal guardian.

This bill also provides that the every violent video game imported or distributed in Florida for retail sale, rental or playing in an arcade must be labeled with a solid white "18" of not less than 2 inches by 2 inches outlined in black on the front of the video game package by the manufacturer.

This bill authorizes a county, municipality, the attorney general, the department of legal affairs (if a violation occurs in more than one judicial circuit), or any person aggrieved by a violation to seek injunctive relief and authorizes the imposition of civil penalties of not more than \$1,000 per violation or not more than \$250 if the person against whom the penalty is being assessed is an employee of a business selling, renting, or allowing a minor to play the violent video game. Any civil penalties collected will be deposited into the General Revenue Fund. If a civil penalty is assessed, this section also authorizes the enforcing authority reasonable attorney's fees and costs. This section provides that a violation of the act is a second degree misdemeanor, and a second or subsequent violation is a first degree misdemeanor. In addition, this provision would allow anyone harmed by a violation of the act to seek damages.

This bill provides an effective date of October 1, 2006.

C. SECTION DIRECTORY:

Section 1

This bill creates an undesignated section of Florida Statutes and provides legislative findings, definitions; prohibits selling or renting a "violent video game" to a minor or allowing a minor to play such a game in an arcade; provides affirmative defense for relying on identification; prohibits importation or distribution of games into the state for retail sale, rental, or arcade playing with out a special label; provides for "enforcing authority" to institute civil action to seek injunctive relief or impose civil penalty for failing to follow minor access restrictions or failing to label; provides attorney's fees; provides for criminal penalties.

Section 2

Provides for an effective date of October 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill requires civil penalties collected as a result of this statute to be deposited into the General Revenue Fund and may consequently increase state revenues by an indeterminate amount.

2. Expenditures:

This bill creates a new criminal offense which could result in misdemeanor convictions and associated costs for prosecution and punishment. Also, there could be expenditures to defend the constitutionality of the law if it is challenged in addition to costs and attorney's fees if the challenge is successful.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill creates authority for municipalities and counties to seek injunctive relief and to seek the imposition of civil penalties. If those entities choose to exercise that authority litigation expenses might be incurred. The bill does provide for the recovery of attorney's fees if the entity is successful.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. Video game manufacturers will have to create and affix the necessary labels. Additionally, an unspecified private entity will have to screen the games utilizing the standards set forth in the bill to determine whether a label is necessary.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

First Amendment

The First Amendment to the United States Constitution restricts the ability of government to regulate speech. The United States Supreme Court has held that a government restriction of speech that is based on content is presumptively invalid.⁶ In those situations, the government bears the burden of demonstrating that the restriction is necessary to serve a compelling state interest and that the restriction is narrowly tailored to achieve that end.⁷

Compelling interest

HB 647 provides a legislative finding that Florida has a "compelling interest in preventing violent, aggressive, and antisocial behavior and in preventing psychological or neurological harm to minors

⁶ *R.A.V. v. St. Paul, Minn.*, 505 US 377, 382, 395 (1992).

⁷ *Id.*

who play violent video games.” In contrast, recent federal trial court decisions have been critical of the evidentiary basis for similar findings and, consequently, have not recognized these concerns as creating a “compelling interest.”⁸

Case Law Specific to Minors

The Supreme Court has held that “In most circumstances, the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors.”⁹ One noteworthy exception is in the area of sexually explicit material. The Court has allowed restrictions on the access of this type of material for minors when it is otherwise constitutionally protected for adults.¹⁰ However, the Supreme Court has not yet extended that exception to allow the restriction of *violent* material to minors and lower federal courts have explicitly rejected such an extension.¹¹

Previous Litigation on Violent Video Game Regulation: Lower courts

Two federal appellate courts have held that video games, including violent ones, are protected forms of expression similar to books, movies, and other literary forms.¹² Additionally, the issue of violent video games has been the subject of a number of federal trial court decisions – none of which have been decided in favor of the government restricting minors’ access to violent video games.¹³ In *VSDA v. Schwarzenegger*, a federal trial court enjoined the enforcement of a California law that is nearly identical to the bill currently under consideration.¹⁴ The court discussed two areas of concern with the California law that this analysis has not previously addressed:

Vagueness

Various federal trial courts have found legislative definitions of violent video games to be unconstitutionally vague because they do not provide standards precise enough for those subject to the law to understand their application.¹⁵ However, in *Schwarzenegger* the court held that the plaintiffs challenging the law did not demonstrate they were likely to succeed on a vagueness theory.¹⁶ The definitions in this bill are the same as those in the California law.

Labeling requirement

The *Schwarzenegger* court also held plaintiffs had demonstrated a likelihood of success on their claim that mandatory labeling of video games unconstitutionally compelled speech by forcing the software manufacturer to declare its game violent.¹⁷ The California labeling provision is identical to

⁸ For the most extensive review see *ESA v. Blagojevich*, No. 05C4265, 2005 WL 3447810 (N.D. Ill. Dec. 2, 2005). See also *VSDA v. Schwarzenegger*, 401 F. Supp. 2d. 1034 (N.D. Cal. Dec. 21, 2005); *ESA v. Granholm*, No. 05-CV-73634, 2005 WL 3008584 (E.D. Mich. Nov. 9, 2005);

⁹ *Erznoznik v. City of Jacksonville*, 422 US 205, 212-13 (1975)(stating also that “[s]peech...cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”) Id. at 214.

¹⁰ See *Ginsberg v. New York*, 390 US 629 (1968). (upholding a New York statute that protected children from non-obscene, and therefore constitutionally protected, material).

¹¹ See *Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180 (W.D.Wash. 2004); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F.Supp.2d 1034 (N.D.Cal. 2005)

¹² *American Amusement Machine Association v. Kendrick*, 244 F.3d 572 (7th Cir.2001), cert. denied, 534 U.S. 994, 122 S.Ct. 462, 151 L.Ed.2d 379 (2001); *Interactive Digital Software Association v. St.Louis County, Missouri*, 329 F.3d 954 at 958 (8th Cir. 2003). The 6th Circuit has also held video games to be protected from civil liability by the First Amendment. See *James v. Meow Media*, 200 F.3d 683 (6th Cir., 2002)

¹³ *ESA v. Blagojevich*, No. 05C4265, 2005 WL 3447810 (N.D. Ill. Dec. 2, 2005); *VSDA v. Schwarzenegger*, 401 F. Supp. 2d. 1034 (N.D. Cal. Dec. 21, 2005); *ESA v. Granholm*, No. 05-CV-73634, 2005 WL 3008584 (E.D. Mich. Nov. 9, 2005); *Video Software Dealers Assn v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004)

¹⁴ *VSDA v. Schwarzenegger*, 401 F. Supp. 2d. 1034 (N.D. Cal. Dec. 21, 2005). The bill language can be found at : http://www.mediacoalition.org/legal/ESAvSchwarzenegger/ab_1179.pdf

¹⁵ See *Blagojevich*, *Maleng*, and *Granholm*.

¹⁶ *VSDA v. Schwarzenegger*, 401 F. Supp. 2d. at 1042.

¹⁷ Id. at 1047. (Citing Supreme Court Precedent that a “[C]ourt should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”) Id.

the one in this bill. A separate federal trial court has declared a similar labeling provision to be unconstitutional.¹⁸

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

¹⁸ *Blagojevich at *85-56.*

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A bill to be entitled

An act relating to violent video games; providing legislative intent; providing definitions; prohibiting a person from selling or renting a video game to a minor, or allowing a minor to play a video game in a video arcade, if the video game has been labeled as a violent video game; providing that having requested identification from a person purchasing a video game or playing a video game in a video arcade is an affirmative defense to any action filed under the act; requiring that each violent video game that is imported into or distributed in this state for retail sale, rental, or playing in a video arcade be labeled in a specified manner; authorizing an enforcing authority to commence a civil action to seek injunctive relief to restrain or enjoin a person from violating the act or to impose a civil penalty; limiting the amount of civil penalties; providing that attorney's fees and costs may be awarded under certain circumstances; directing that any civil penalty recovered be deposited into the General Revenue Fund; providing that a violation of the act is a misdemeanor; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Distribution of violent video games to minors prohibited; penalties.--

(1) The Legislature finds that:

(a) Minors who are exposed to depictions of violence in

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29 video games are more likely to experience feelings of
30 aggression, to experience a reduction of activity in the frontal
31 lobes of the brain, and to exhibit violent antisocial or
32 aggressive behavior.

33 (b) Even minors who do not commit acts of violence suffer
34 psychological harm from prolonged exposure to violent video
35 games.

36 (c) This state has a compelling interest in preventing
37 violent, aggressive, and antisocial behavior and in preventing
38 psychological or neurological harm to minors who play violent
39 video games.

40 (2) As used in this section, the term:

41 (a) "Cruel" means the intention to virtually inflict a
42 high degree of pain by torture or serious physical abuse of the
43 image of a victim in addition to killing the image of the
44 victim.

45 (b) "Depraved" means pleasure in the virtual killing or
46 indifference to the suffering of the image of the victim, as
47 evidenced by torture or serious physical abuse of the image of a
48 victim.

49 (c) "Enforcing authority" means a county or municipal
50 attorney, the state attorney, the Department of Legal Affairs if
51 a violation of this section occurs in more than one judicial
52 circuit, or anyone aggrieved by a violation of this section.

53 (d) "Heinous" means shockingly atrocious. For the killing
54 depicted in a video game to be heinous, it must involve
55 additional acts of torture or serious physical abuse of the
56 image of a victim as set apart from other killings.

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(e) "Minor" has the same meaning as in s. 1.01, Florida Statutes.

(f) "Person" has the same meaning as in s. 1.01, Florida Statutes.

(g) "Serious physical abuse" means a significant or considerable amount of injury or damage to the image of a victim's body suggesting substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse, unlike torture, does not require that the victim be depicted as conscious of the abuse at the time it is inflicted. However, the player must specifically intend the abuse apart from the killing.

(h) "Torture" includes mental as well as physical abuse of the image of a victim. In either case, the victim must be depicted as conscious of the abuse at the time it is inflicted, and the player must specifically intend to virtually inflict severe mental or physical pain or suffering upon the victim, apart from killing the image of the victim.

(i) "Video arcade" means any premises where 10 or more video game machines or devices are operated and where minors are legally permitted to enter.

(j) "Video game" means any electronic amusement device that uses a computer, microprocessor, or similar electronic circuitry and its own monitor, or a device that is designed to be used with a television set or a computer monitor, which interacts with the user of the device.

85 (k) "Violent video game" means a video game in which the
86 options available to a player include killing, maiming,
87 dismembering, or sexually assaulting an image of a human being,
88 if those acts are depicted in the game in a manner that:

89 1.a. A reasonable person, considering the game as a whole,
90 would find appeals to a deviant or morbid interest of minors;

91 b. Is patently offensive to prevailing standards in the
92 community concerning what is suitable for minors; and

93 c. Lacks serious literary, artistic, political, or
94 scientific value for minors; or

95 2. Enables the player to virtually inflict serious injury
96 upon images of human beings or characters having substantially
97 human characteristics in a manner that is especially heinous,
98 cruel, or depraved in that it involves torture or serious
99 physical abuse to the image of a victim.

100
101 Pertinent factors in determining whether a killing depicted in a
102 video game is especially heinous, cruel, or depraved include
103 infliction of gratuitous violence upon the image of a victim
104 beyond that necessary to commit the killing, needless mutilation
105 of the image of a victim's body, and helplessness of the image
106 of a victim.

107 (3) A person may not sell or rent a video game to a minor,
108 or allow a minor to play a video game in a video arcade, if the
109 video game has been labeled as a violent video game.

110 (4) Proof that a person, or his or her employee or agent,
111 demanding, was shown, and reasonably relied upon evidence that a
112 purchaser or renter of a violent video game, or the player of a

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113 violent video game in a video arcade, was not a minor, or that
114 the manufacturer failed to label a violent video game as
115 required by subsection (6), is an affirmative defense to any
116 action brought under this section. Evidence of majority
117 includes, but need not be limited to, a driver's license or an
118 identification card issued to the purchaser, renter, or player
119 by a state or by the Armed Forces of the United States.

120 (5) This section does not apply if the violent video game
121 is sold or rented to a minor by the minor's parent, grandparent,
122 aunt, uncle, or legal guardian.

123 (6) Each violent video game that is imported into or
124 distributed in this state for retail sale, rental, or playing in
125 a video arcade must be labeled with a solid white "18" outlined
126 in black of not less than 2 inches by 2 inches. The "18" must be
127 displayed on the front face of the video game package.

128 (7) (a) An enforcing authority may institute a civil action
129 in order to:

130 1. Seek injunctive relief to immediately restrain or
131 enjoin any person from engaging in any activity in violation of
132 this section or to seek injunctive relief to enforce compliance
133 with this section.

134 2. Impose a civil penalty for each violation of this
135 section. If the person against whom the civil penalty is sought
136 is a person who possesses managerial responsibility for a
137 business entity selling, renting, or playing a violent video
138 game, the civil penalty may be in an amount of not more than
139 \$1,000 per violation. If the person against whom the civil
140 penalty is sought is an employee of the business entity selling,

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141 renting, or playing a violent video game, the civil penalty may
142 be in an amount of not more than \$250 per violation.

143 (b) If a civil penalty is assessed in any litigation, the
144 enforcing authority is entitled to reasonable attorney's fees
145 and costs.

146 (c) If a civil penalty is collected, the penalty shall
147 accrue to the state and be deposited into the General Revenue
148 Fund.

149 (8)(a) A person who violates subsection (3) or subsection
150 (6) commits a misdemeanor of the second degree, punishable as
151 provided in s. 775.082 or s. 775.083, Florida Statutes.

152 (b) A person who commits a second or subsequent violation
153 of subsection (3) or subsection (6) commits a misdemeanor of the
154 first degree, punishable as provided in s. 775.082 or s.
155 775.083, Florida Statutes.

156 Section 2. This act shall take effect October 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

Bill No. 647

COUNCIL/COMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

Council/Committee hearing bill:

Representative(s) Greenstein offered the following:

Amendment (with directory and title amendments)

Remove line(s) 156 and insert:

(9) It is unlawful for a minor to purchase, rent, or play at a video arcade, a game that has been labeled as a violent video game.

(10) It is unlawful for a minor to misrepresent his or her age for the purpose of inducing a person or an agent or employee of the person to sell, rent, or allow such minor to play at a video arcade, a game that has been labeled a violent video game.

(11) A person who violates subsection (9) or subsection (10) commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083, Florida Statutes, and by a minimum of 20 hours of community service.

Section 2. This act shall take effect October 1, 2006.

===== T I T L E A M E N D M E N T =====

Remove line(s) 10 and insert:

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HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

21 filed under the act; prohibiting a minor from renting,
22 purchasing, or playing at a video arcade a game that has been
23 labeled as a violent video game; prohibiting a minor from
24 misrepresenting his or her age to induce the sale, rental or
25 opportunity to play at a video arcade a game labeled as a
26 violent video game; providing a misdemeanor penalty; requiring
27 the performance of community service; requiring that each
28 violent video

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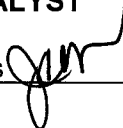
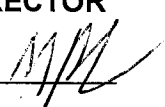
HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 247 Beverage Law

SPONSOR(S): Bogdanoff and others

TIED BILLS: None

IDEN./SIM. BILLS: SB 144, SB 282, SB 944

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Business Regulation Committee</u>		Morris 	Liepshutz 
2) <u>Finance & Tax Committee</u>			
3) <u>Commerce Council</u>			
4) _____			
5) _____			

SUMMARY ANALYSIS

A recent U. S. Supreme Court ruling, *Granholm v. Heald*, struck down laws in Michigan and New York, similar to Florida law, allowing in-state wineries to make direct deliveries of wine to consumers, but prohibiting out-of-state wineries from making direct deliveries. The Court held that the laws in both states discriminated against interstate commerce to the benefit of in-state interests in violation of the Commerce Clause, Art. I, s. 8, cl. 3, and that the discrimination was neither authorized nor permitted by the Twenty-first Amendment. Subsequent to the *Granholm* decision the U. S. District Court in Tampa ruled, in a pending Florida case *Bainbridge v. Turner*, that ss. 561.54(1) and (2) and 561.545(1), F.S., also discriminated against out-of-state wine producers to the advantage of in-state wine producers and were unconstitutional under *Granholm*.

In response to the *Granholm* and *Bainbridge* decisions, this bill creates a direct shipper license and the regulatory mechanism which allows the direct shipment of wine by out-of-state or in-state direct shippers to Florida consumers for personal consumption and to Florida vendors for resale.

A Bill Impact Conference has not been scheduled to evaluate the potential fiscal impact of this legislation on state revenue collections and expenditures. See FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT for an estimate of expenditures by the Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation.

The bill provides that the act will take effect upon becoming a law.

[The sponsor of this legislation plans to offer a strike-all amendment to the bill at the February 7, 2006, Business Regulation Committee meeting.]

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard Individual Liberty--Both commercial and individual freedom are expanded by allowing of out-of-state as well as in-state entities to sell wine directly to Florida consumers or vendors without the restrictions of the current three-tier system of alcoholic beverage distribution.

Provide Limited Government—The bill creates a new license and regulatory system; the Division of Alcoholic Beverages and Tobacco of the Department of Business and Professional Regulation estimates the need for 23.5 FTEs and approximately \$1.3 million annually to implement and regulate the direct shipment of wine as provided in this legislation.

B. EFFECT OF PROPOSED CHANGES:

HISTORY OF ALCOHOL BEVERAGE REGULATION

Methods of controlling alcoholic beverage commerce have varied from complete inaction to absolute prohibition. Adopted in 1920, the 18th Amendment to the U. S. Constitution ushered in prohibition by forbidding the manufacture, sale, transportation, importation and exportation of beverage alcohol. The 21st Amendment to the U. S. Constitution, adopted in 1933, repealed prohibition. The 21st Amendment prohibits the transportation or importation into any state in violation of that state's laws and places the responsibility of controlling alcoholic beverage commerce upon the individual states for all activity within that state's borders.

The ability to engage in alcoholic beverage commerce is commonly viewed as a privilege subject to stringent safeguards. Alcoholic beverages are a highly taxed and highly regulated commodity. In addition to protecting the public from the harms of excess and other objectionable conditions that preceded prohibition, the framers of state and federal laws sought to provide sufficient regulatory authority under which enforcement of the beverage laws and the collection of license fees and taxes could be achieved.

Currently in the United States, most states operate under a "license" system. "License" states issue licenses to private individuals or businesses in all segments of alcoholic beverage commerce. The State of Florida operates under such a license system. Other states, however, maintain more direct control over the sale of alcoholic beverages by substituting the state for the private marketplace and are known as "control" states. Some states control only the wholesale level; others have retained control at retail through government-operated stores; and some control the sale of wine, as well as distilled spirits.

The Division of Alcoholic Beverages and Tobacco [division] in the Department of Business and Professional Regulation is responsible for supervising the conduct, management, and operation of the manufacturing, packaging, distribution, and sale within the state of all alcoholic beverages. This authority includes licensing businesses, conducting criminal and administrative investigations; conducting audits, inventories and tax assessments; seizing non-tax paid alcoholic beverages; imposing penalties for violations. The licensed premises of a Florida alcoholic beverage licensee are subject to random, unannounced inspection and a licensee can lose the ability to operate for violations of the Beverage Law or other state laws. Licensure requirements, qualification standards and prohibitions are set forth in ss. 561.15 and 561.17, F.S.

Florida's alcoholic beverage law provides for a structured three-tiered distribution system: manufacturer, wholesale distributor, and retailer.¹ Alcoholic beverage excise taxes are collected at the wholesale level and the state sales tax and by-the-drink tax are collected at the retail level. For FY 2004-05 the Division collected \$575.9 million in state alcohol excise taxes [\$117.8 million from wine products] and the Office of Demographic Research estimates that \$549.3 was collected from the retail sale of all alcoholic beverages in the state; estimates specific to wine were not available. Alcoholic beverage wholesalers are audited twice each year. In general, the excise tax rate on wine is \$2.25 per gallon.²

¹ See s. 561.14, F.S. for license and registration classifications

² Section 564.06, F.S., establishes a staggered taxation rate on wine based upon the percent of alcohol by volume. Typical table wine containing 0.5 percent or more alcohol by volume but less than 17.259 percent alcohol by volume is taxed at a rate of \$2.25 per gallon.

Activities between the license groups are extensively regulated and constitute the basis for Florida's "Tied House Evil" law.³ Among those restrictions, s. 561.42, F.S., prohibits a manufacturer or distributor from having any financial interest, directly or indirectly, in the establishment or business of any vendor. Manufacturers and distributors are also prohibited from assisting any vendor by any gifts or loans of money or property of any description or through rebates.

Section 561.22, F.S., provides that no manufacturer, distributor or exporter may be licensed as a vendor [retailer]. This statute further provides that no vendor may also be licensed as a manufacturer, distributor or exporter. Section 561.24, F.S., provides that no manufacturer, rectifier or distiller of spirituous liquors or wine can be licensed as a distributor or registered as an exporter. Vendors are explicitly prohibited from importing any alcoholic beverage from outside the state, s. 561.14, F.S. The Beverage Law allows Florida retailers to ship alcoholic beverages directly to Florida consumers, s. 561.57, F.S. A simple explanation of the Florida Beverage Law is that the law requires all alcoholic beverages to move through three separate regulated tiers, manufacturer ► wholesale distributor ► retail vendor, before reaching the ultimate consumer.

Notwithstanding the overall premise, the Beverage Law contains a series of exceptions to the structured three-tiered distribution system. Included among those exceptions is authority for the licensure of wineries where the manufacturer of the beverage is also the wholesale distributor and the retail vendor of the product.

Section 561.221, F.S., authorizes the issuance of up to three vendor [retail] alcoholic beverage licenses for wine manufacturers in the state if the retail premises are situated on property contiguous to the manufacturing premises. Florida wineries may also be dually licensed as wholesale distributors. In addition, qualifying wineries may receive a designation as a Certified Florida Farm Winery.⁴ To qualify, a winery must:

- Produce or sell less than 250,000 gallons of wine annually;
- Maintain a minimum of 10 acres of owned or managed vineyards in Florida;
- Be open to the public for tours, tastings, and sales at least 30 hours each week;
- Make application for the designation and pay an annual fee of \$100.

Florida Farm Wineries may also be issued permits to conduct tastings and sales of wine produced by the certified Florida Farm Winery at fairs, trade shows, expositions, and festivals.

HISTORY OF DIRECT SALES

In recent years there has been an expansion of solicitations and advertisements for alcoholic beverage sales, particularly wine, via magazines, specialty catalogues, direct mailings and, more recently, the Internet. In addition, there has been increased interest on the part of consumers to more easily obtain their specific wines of choice via these alternatives. Sales of this nature most often bypassed the state's regulatory and tax collection procedures and were, therefore, in violation of Florida law which generally requires all alcoholic beverages to pass through three separate regulated tiers: manufacturer, wholesaler, and retailer, before reaching the ultimate consumer. During this same time period consumers and wine industry interests have sought the ability to legally ship wine into the various states through reciprocity laws or laws allowing for limited direct shipping.

In the early 1990's the Division of Alcoholic Beverages and Tobacco issued numerous requests to out-of-state shippers to discontinue the practice of selling and shipping alcoholic beverages, primarily wine, directly to Florida consumers in violation of state law. The division, however, lacked legal jurisdiction to require compliance on two fronts: 1) since the out-of-state shippers did not maintain a physical presence in the State of Florida there was no nexus to bring them under Florida jurisdiction; and 2) federal law did not provide a remedy by which the state could receive injunctive relief in federal courts.⁵ This scenario appeared to leave Florida regulators without a means to require out-of-state shippers to comply with Florida's regulatory and taxation requirements.

³ In the beverage alcohol industry, licensed premises are often called "houses." It was perceived to be an *evil* for houses of the retail tier to be tied to houses at the wholesaler or manufacturing tier – hence, *Tied House Evil*. This group of laws is designed to prevent manufacturers or wholesalers from owning or controlling retail outlets where their product may be sold to the exclusion of other products and where, during pre-prohibition years, an abundance of social ills existed.

⁴ According to the Division of Alcoholic Beverages and Tobacco there are currently 37 licensed wineries in Florida. There are 13 Certified Florida Farm Wineries located in the state.

⁵ See *Department of Business and Professional Regulation v. Sam's Wines and Liquors*, No. 96-3602, (Fla. 2nd Cir. Ct., September 3, 1997), *affirmed* 731 So.2d 655 (Fla. 1st DCA 1999) and *Florida DBR v. Zachy's*, 125 F.3d 1399 (11th Cir. 1997)

The Legislature, in 1997, found that the direct shipment of alcoholic beverages was a danger to the public health, safety, and welfare; to state revenue collections; and to the economy of the state. The 1997 Legislature enacted Chapter 97-213, Laws of Florida, which increased the penalty from a misdemeanor to a 3rd degree felony for knowingly and intentionally shipping alcoholic beverages from an out-of-state location directly to a Florida consumer in violation of the Beverage Law. Some argued that this penalty increase would act as a deterrent to direct shipping since a wine manufacturer would not risk losing their federal permit by being charged with a felony.⁶ Others argued that the penalty and the underlying regulatory structure were antiquated, anticompetitive, and a violation of free trade between the states.

Florida's direct shipping statute was subsequently challenged in *Bainbridge v. Turner*.⁷ During this same period similar challenges were taking place in other states, including Michigan and New York, with mixed results.

DIRECT SHIPPING LITIGATION

Granholm v. Heald

Similar to Florida's law, the State of Michigan banned out-of-state wineries from shipping wine directly to consumers but allowed in-state wineries to do so. The State of New York allowed direct shipments to residents but only if the out-of-state shipper obtained a license and a condition of obtaining that license was a physical presence in the state. Both laws were challenged and Michigan's law was held invalid while the New York law was upheld. Appeals from these two cases were ultimately consolidated into a single case before the U. S. Supreme Court, *Granholm v. Heald*.⁸ In its decision, the Court attempted to balance two parts of the U. S. Constitution: the Commerce Clause which requires unrestricted trade between the states and the 21st Amendment which gives regulatory power to the states over all alcoholic beverage sales within that state's borders.

The question before the Supreme Court was: *Does a state regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of Section 2 of the Twenty-first Amendment?*

Section 2 of the 21st Amendment to the U. S. Constitution reads: *The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*

The U. S. Supreme Court struck down both the Michigan and New York laws. The Court held that the laws in both states discriminated against interstate commerce in violation of the Commerce Clause, Art. I, s. 8, cl. 3, and that the discrimination was neither authorized nor permitted by the Twenty-first Amendment.

The Court ruled that either all sales of wine must be through face-to-face transactions or a permit system must be developed to allow for wine deliveries from out-of-state which did not discriminate against out-of-state interests to the benefit of in-state interests. The Court stated that tax collection and other regulatory objectives -- facilitating orderly market conditions, ensuring regulatory accountability, protecting the public health and safety - - could be achieved through a permit system. States may not require residency of wine producers in order to compete on equal terms with in-state businesses, nor may states require reciprocal shipping privileges for wine producers from other states. The Court's decision addresses only wine producers. The Court specifically distinguished other products and the opinion does not directly open the door for out-of-state retailers to ship direct. The Court made a clear distinction between laws regarding direct sales by wine producers as distinguished from the state's regulation within its borders of the resale of alcohol beverages.

The Court did not specifically address the issue of personal jurisdiction for purposes of enforcement but referenced the authority of the states' attorneys general to seek injunctive relief in federal court under the 21st Amendment Enforcement Act and a winery's potential loss of its federal basic permit as incentive to comply with a state's alcoholic beverage statutes. [See also **Federal Law** comments.]

The traditional three tier system of alcohol beverage distribution utilized by Florida and many other states was held to be legitimate as long as state laws satisfy the key holdings of *Granholm*.

⁶ The Federal Alcohol Administration Act, 27 U.S.C. s. 203, requires a basic permit in order to engage in the business of importing into the United States distilled spirits, wine, or malt beverages, to engage in the business of distilling spirits or producing wine, and for wine, spirits and beer wholesalers. Retailers and beer manufacturers are not required to obtain a federal basic permit.

⁷ *Bainbridge v. Turner*, Case No. 8:99-CV-2681-T-27TBM; Originally *Bainbridge v. Martelli*, 148 F.Supp.2d 1306 (M.D. Fla. 2001)

⁸ *Granholm v. Heald*, 125 S.Ct. 1885 (May 16, 2005)

Bainbridge v. Turner

At a status conference held by the court on May 25, 2005, the State conceded that based upon the *Granholm* decision the two statutes in question in *Bainbridge v. Turner*,⁹ ss. 561.54(1)-(2) and 561.545(1), F.S., were unconstitutional.

Subsequently, an August 5, 2005 Order issued by U. S. District Court Judge James Whittemore in Tampa found the two statutes in question in *Bainbridge* violated the Commerce Clause to the extent that they discriminate against out-of-state wineries by prohibiting them from selling and delivering wine directly to customers in Florida when in-state wineries are not so prohibited.

"Florida's direct shipment scheme, codified in ss. 561.54 and 561.545, Florida Statutes, does precisely what was determined to be unconstitutional in *Granholm*. Florida's direct shipment statutes prohibit *out-of-state vendors and producers* from delivering wine directly to Florida residents whereas in-state producers are not so prohibited. Florida's statutory scheme requires out-of-state wine to pass through a wholesaler and retailer, whereas wine produced in Florida is not required to pass through a wholesaler and distributor. Florida's statutory scheme thereby discriminates against out-of-state wine producers to the advantage of in-state wine producers in violation of the Commerce Clause and is therefore unconstitutional under *Granholm*." [Emphasis supplied]

While the Order enjoined the State from enforcing the two statutes in question, it is unclear whether direct wine shipments are allowed under the statutory scheme remaining in place. Further, it remains unclear whether this injunction is limited to out-of-state wineries or permits direct shipments by out-of-state wineries and *other shippers* that are not wineries. The Order did not address the constitutionality of these statutes with regard to other alcoholic beverages such as beer and spirits. A legislative response to *Granholm* and *Bainbridge* is required to clarify Florida law.

FEDERAL LAW

Two federal laws are relevant to this issue.

First, the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. s. 203, requires a basic permit in order to engage in the business of importing into the United States, distilled spirits, wine or malt beverages. Likewise, a basic permit is required to engage in the business of distilling spirits or producing wine. A basic permit is also required for spirits, wine and malt beverage wholesalers. Retailers are not required to obtain basic permits under the FAA Act. The FAA Act provides that basic permits are conditioned upon, among other things, compliance with the Twenty-first Amendment and other Federal laws relating to its enforcement.

The Bureau of Alcohol, Tobacco, and Firearms [now Bureau of Alcohol and Tobacco Tax and Trade] in ATF Ruling 2000-1 ruled that the Bureau could, under appropriate circumstances, take administrative action against a basic permit where a basic permittee ships alcoholic beverages into a State in violation of the laws of that State.

"ATF will intervene when it is determined that there is a continuing, material, adverse impact upon a State through the actions of a basic permittee located outside the boundaries of the affected State. However, while ATF is vested with authority to regulate interstate commerce in alcoholic beverages pursuant to the FAA Act, the extent of this authority does not extend to situations where *an out-of-State retailer* is making the shipment into the State of the consumer." [Emphasis supplied.]

Second, the Twenty-first Amendment Enforcement Act, 27 U.S.C. s. 122a, provides the federal district courts with subject matter jurisdiction over any action brought by a state attorney general against a person who is engaged in, or has engaged in, the illegal transportation of alcoholic beverages into a state. The act prohibits the direct shipment of wine into a state in violation of state laws and authorizes state attorneys general the power to sue wineries in federal court to enjoin violations of state law. There are no known instances where a state attorney general has utilized this law.¹⁰

⁹ *Bainbridge v. Turner*,⁹ Case No. 8:99-CV-2681-T-27TBM, (M.D. Fla. August 5, 2005)

¹⁰ Information gathered from conversations with industry representatives; see also *Interim Project Summary 2006-146*, Committee on Regulated Industries, the Florida Senate, October 20005.

EFFECT OF PROPOSED CHANGES

This bill creates a new s. 561.585, F.S., and the license and regulatory mechanism which allow the direct shipment of wine into Florida for personal consumption or for vendor resale.

A direct shipper license is not limited to wineries but may be issued to any person, firm, corporation, or other entity. To obtain a direct shipper license an applicant must maintain licensure as a primary American source of supply, provide the division with a copy of its current alcoholic beverage license issued by this or another state, and pay a \$100 license fee. Direct shipper licenses may be renewed annually upon payment of a \$100 renewal fee and proof of continued qualification.

Primary American Source of Supply

For purposes of tax revenue control s. 564.045, F.S. requires the registration of each brand of wine sold in Florida and the licensure of that brand's "primary American source of supply" [PAS]. There is only one PAS for each brand and each brand must have a licensed PAS. Generally, the PAS is either the wine manufacturer or the source closest to the manufacturer in the channel of commerce from whom the product can be secured. Licensure as a PAS authorizes the shipment of wine manufactured within and without the state to licensed distributors, importers, manufacturers, bonded warehouse, and registered exporters within the state. Applicants for a PAS license are not required to meet the licensure requirements and qualification standards set out in ss. 561.15 and 561.17 that are required of other alcoholic beverage licensees.

This bill requires as a condition of licensure as a direct shipper that the applicant obtain and maintain a current license as a primary American source of supply.

Record Retention, Reporting Requirements and Tax Payments

The Beverage Law requires manufacturers, distributors, sales agents, importers, and exporters to maintain records and make monthly reports to the division of all beverages manufactured, imported, exported, and sold within the state. Reports must be made by the 10th day of each month and records must be maintained for a period of three years. Excise taxes must be paid by the 10th day of each month and licensed wholesalers are audited twice each year for compliance. In addition, alcoholic beverage manufacturers and wholesalers are required to file a surety bond with the division to ensure the payment of all taxes. The surety bond for a winery is \$5,000 and for a wine distributor is \$25,000. [See ss. 561.37, 561.50, 561.55, F.S.]

This bill places reporting, tax payment and records retention requirements for direct shipments in newly created s. 561.585 (3) and (4), F.S., and requires direct shippers to report monthly to the division the total amount of wine by type shipped into the state for the preceding month. Direct shippers are required to pay the appropriate excise tax to the division and the appropriate sales tax to the Department of Revenue monthly. The bill provides that Internet orders received by a vendor will be construed as a sale actually made at the vendor's licensed place of business. Records of the direct shipments, including the names, addresses, amounts, and dates of all shipments to persons in this state must be maintained and are subject to audit by the Division of Alcoholic Beverages and Tobacco or the Department of Revenue upon request. No audit schedule is provided and there is no surety bond requirement.

Age Verification

The Beverage Law makes it unlawful for any person to sell, give, serve, or permit to be served any alcoholic beverage to a person less than 21 years of age. A violation of this prohibition constitutes a 2nd degree misdemeanor. In addition, a vendor's alcoholic beverage license is subject to suspension or revocation for unlawful sales to persons under the age of 21 by the licensee or an employee of the licensee and for other violations of the Beverage Law. The Beverage Law does not specifically require a vendor to check identification to verify age prior to sale but provides a complete defense to a vendor making an unlawful sale if: 1) the person falsely evidenced that he or she was of legal age to purchase or consume the beverage; 2) the appearance of the person was such that an ordinarily prudent person would believe him or her to be of lawful age; and 3) the licensee or employee checked one of the approved forms of identification. For these purposes approved forms of identification include: a driver's license, an identification card issued by this state or another state, a passport, or a United States Uniformed Services identification card. [See s. 562.11, F.S.] Likewise, the Beverage Law does not specifically require a licensee or an agent of the licensee making a delivery of an alcoholic beverage to check identification to verify the recipient is at least 21 years of age.

This bill, in newly created s. 561.585(2), F.S., mandates that the direct shipper must require that the signature of the recipient is obtained prior to delivery and after presentation of a valid identification showing the recipient is 21 years of age or older. Acceptable forms of identification are the same as specified in s. 562.11. This new subsection also requires the direct shipper to place "SIGNATURE OF ADDRESSEE AGE 21 OR OLDER REQUIRED FOR DELIVERY" on the outside shipping label of each package.

Similarly, the bill amends s. 561.57(6), F.S., to require all common carriers acting as agents for delivery to verify that a person receiving alcoholic beverages is at least 21 years of age and requires the division to adopt rules. This amendment specifies that adherence to these age verification procedures provides the common carrier and the licensee or other person hiring the common carrier with a complete defense of selling, giving or serving alcoholic beverages to any person under the age of 21.

Common Carriers

Section 562.20, F.S., requires common carriers to file monthly reports of alcoholic beverages deliveries into or within the state with the division. Section 561.57, F.S., authorizes Florida vendors to make deliveries away from their places of business of sales actually made at the licensed business location and specifies that telephone and mail orders shall be construed as sales actually made on the licensed premises.

Section 561.57(5), F.S., is amended by this bill to add Internet orders, in addition to telephone and mail orders, as a sale actually made at the vendor's licensed place of business. Subsection (6) of s. 561.57, F.S., is amended to permit a common carrier or any licensee or other person utilizing a common carrier as his or her agent to make deliveries of alcoholic beverages into the state and exempts them from the report filing requirements in s. 562.20, F.S.

This bill creates a new subsection (3) in s. 561.54, F.S. and a new paragraph (5)(c) in s. 561.545, F.S., to create an exception to the direct shipping prohibitions contained therein and allow the shipment of wine by a licensed direct shipper and delivery by a common carrier in accordance with newly created s. 561.585, F.S.. Sections 561.54 and 561.545, F.S., were the two statutory provisions ruled unconstitutional in *Bainbridge*.

Penalties

Newly created s. 561.585(6), F.S. provides that in addition to the penalties provided by s. 561.545, F.S., the division may suspend or revoke a direct shipper's license or impose fines for any violation of the newly created s. 561.585, F.S. and its related laws or rules. In addition, any direct shipper, or anyone transporting wine from an out-of-state location, that knowingly and intentionally ships wine directly to any person in this state who is under 21 years of age commits a felony of the third degree. Further, this subsection provides that any person who obtains wine from a direct shipper in violation of s. 561.585, F.S., commits a misdemeanor of the second degree.

Jurisdiction

The bill creates a new s. 561.585(5), F.S., which specifies that by obtaining a direct shipper license the licensee is deemed to have consented to the jurisdiction of the division and to any other state agency and the courts of this state concerning enforcement.

Fiscal Impact

A Bill Impact Conference has not been scheduled to evaluate the potential fiscal impact of this legislation on state revenue collections or expenditures. The Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation has made preliminary estimates based on a number of assumptions. Please see II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT portion of the bill analysis.

C. SECTION DIRECTORY:

Section 1. Creates a new s. 561.585, F.S., creating a direct shipper license and authorizing the direct shipment of wine for personal consumption or vendor resale.

Section 2. Creates a new subsection (3) in s. 561.54, F.S., allowing common carriers to deliver wine directly to Florida consumers 21 years of age or older and to retail vendors and exempting those shipments from the direct shipping prohibitions in s. 561.54.

Section 3. Amends s. 561.545(5), F.S., authorizing the direct shipment of wine to individuals and retail vendors by licensed direct shippers and exempting those shipments from the direct shipping prohibitions and penalties in s. 561.545.

Section 4. Amends s. 561.57, F.S., to construe Internet orders as taking place on the vendor's licensed premises, exempting common carriers from certain reporting requirements, providing for age verification procedures, and providing a defense for common carriers and licensees for certain unlawful sales.

Section 5. Provides that the act will take effect upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

A. FISCAL IMPACT ON STATE GOVERNMENT

The Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation provided the following estimate of revenue:

Licensing Fees:

The State of Florida will receive a \$100 licensing fee for every direct shipper who wishes to ship wine directly to consumers in Florida. It is unknown how many direct shippers will be licensed, but if each of the current 1,098 Primary American Source (PAS) registrants become licensed during the first year it would generate additional licensing revenue of \$109,800 annually. In addition, to known PAS registrants, there could be a substantial increase from other direct shippers, e.g. retailers, who wish to become licensed to sell directly into Florida.

Excise Taxes:

Direct shippers are required to pay excise taxes on all wines shipped directly to individuals and vendors in this state. The amount of excise tax generated by HB 247 is difficult to estimate because there is no current data on the number of consumers in Florida that purchase wine or would purchase wine via direct shipments into Florida. Assuming that $\frac{1}{2}$ of 1% of the consuming population will purchase directly, there could be 60,000 individual recipients. This bill also allows vendors to purchase wine from licensed direct shippers. There are approximately 36,151 licensed vendors selling wine in Florida. Some individuals might purchase from the vendors, thus reducing the anticipated numbers who would purchase directly from the direct shipper. For analysis purposes, it is assumed that one quarter of either identified group will purchase directly from direct shippers. For analysis purposes, it is assumed that individuals will purchase at least four cases of wine each per year and that vendors will purchase at least 20 cases of wine each per year. With one case of wine equaling 2.38 gallons and assuming an excise tax rate of \$2.25 per gallon, the estimated excise tax collection would be \$1,287,905 for the first year. A 2% increase each year would generate excise taxes of \$1,313,663 and \$1,339,936 in the following two years.

REVENUE			
	FY 2006-07	FY 2007-08	FY 2008-09
License Fees:	109,800	117,600	130,400
Taxes:	1,287,905	1,313,663	1,339,936
Other (identify):	0	0	0
TOTAL:	1,397,705	1,431,263	1,470,336

2. Expenditures:

The Division of Alcoholic Beverages and Tobacco in the Department of Business and Professional Regulation estimates the need for 23.5 additional positions to implement and regulate the direct shipment of wines into the State of Florida pursuant to this legislation and provided the following information:

Licensing:

Based on the foregoing assumptions, there will be an increase of an estimated 1098 out-of-state shippers' licenses to be processed each year. It is estimated that the increase in workload will require one half-time Regulatory Specialist II position. This position will license the out-of-state shippers and microfilm all of the corresponding licensing records. It will be necessary to keep this permanent position in order to maintain the continual licensing and registering processes.

Auditing:

With each of the 1,098 potential direct shippers reporting each month, a total of 13,176 reports can be anticipated annually. Utilizing 30 minutes to process each report, and using 1,854 available work hours per employee, the Bureau of Auditing will need 4 additional Revenue Specialist positions in addition to current staff for monthly report processing.

The frequency of audits is not determined by the bill. In-state manufacturers are currently audited semi-annually by the division. Although this audit frequency may not be practical for the out-of-state entities, by auditing the estimated 1,098 licensed direct shippers biannually, and requiring a minimum of 16 hours to perform each audit, the Bureau of Auditing would need 9 additional Tax Auditor positions to perform excise tax audits. Estimated travel of \$12,000 will be required annually per auditor, which will encompass one trip per month, per auditor.

Enforcement:

The enforcement program will require four new law enforcement positions to be stationed throughout the state for the enforcement of this new law and two new Administrative Assistant positions to administer complaint paperwork. The law enforcement positions will be required to investigate violations and prepare criminal court prosecutions for failing to register, tax compliance, non-payment of fees, and sales of alcohol to minors.

Information Technology:

There will be a need for extensive computer programming for the direct shipment program within the department and the division. A licensing program must be developed or enhanced in our current licensing system to incorporate the licensing of the out-of-state suppliers. This is a new program that the division's systems do not currently support. A records maintenance system will be needed to incorporate the additional records that must be maintained for the new licensees. Again, the current systems do not support these types of records. Extensive report and tax data information capture systems must be developed to trace shipments between the out-of-state licensed shippers and the in-state recipients. This should be an Internet-based reporting program or some form of electronic filing system. Current systems will not support the amount of information coming from this type of reporting. In addition, audit programs must be developed to verify the accuracy of the reported shipments and taxes paid. Information Technology will need one additional position, a Systems Programming Administrator, to develop and maintain these programs.

Office of the General Counsel:

An additional senior attorney position will be required to assist the division in the implementation and enforcement of the program. The attorney position will incur travel costs once enforcement actions are commenced. Estimated travel of 1 trip per month at \$500 per month for 12 months would be \$6,000.

Service Operations:

The new license requires an annual renewal, which will create a workload increase in the Central Intake Unit. Annual renewals increase the revenue activity and renewal of license records. Support of these license records is performed throughout the life of the record. The division will need two Regulatory Specialist II positions to process annual renewals for a conservative base of 1,000 records. In addition, these positions will perform data entry needed to maintain license records, including name, address and renewal changes. A significant increase in the estimated number of new licenses will require a proportionate increase in new positions the bureau will need.

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
Non-Recurring Effects	FY 2006-07	FY 2007-08	FY 2008-09
Operating Capital Outlay	45,050	0	0
Other Personal Services	0	0	0
Other Expenses	77,457	0	0
Subtotal	122,507	0	0

EXPENDITURES – FUNDING SOURCE (TRUST FUND)			
Recurring Effects	FY 2006-07	FY 2007-	FY 2008-09

		<u>08</u>	
Salaries/Benefits 23.5 FTE's	1,065,131	1,103,476	1,131,063
Expenses	262,055	262,055	262,055
Other DMS/Hr Svc.	9,236	9,568	9,807
Subtotal	1,336,421	1,375,099	1,402,925

Non-Operating Expenditures	<u>FY 2006-07</u>	<u>FY 2007-08</u>	<u>FY 2008-09</u>
Service Charges (to General Revenue)	9,896	10,503	11,476
Other Indirect Costs	0	0	0

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

According to the Federal Trade Commission bans on interstate direct shipping of wine represent the single largest regulatory barrier to expanded e-commerce of wine.¹¹ Many wine producers reportedly rely on the Internet to market their product and implementation of this legislation would support the increased viability of these businesses.

It is unknown to what extent the availability of direct-to-consumer purchases and direct to retail sales of wine will decrease sales made at licensed Florida retail locations and from licensed wholesalers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

Please see Direct Shipping Litigation on Page 4 of the bill analysis.

B. RULE-MAKING AUTHORITY:

The division is required by rule to prescribe the age verification process of common carriers.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Division of Alcoholic Beverages and Tobacco, Department of Business and Professional Regulation offered the following observations:

1. This bill permits licensed direct shippers to ship alcoholic beverages to licensed vendors which is in conflict with 561.14, F.S., which restricts vendor purchases from other than a Florida licensed wholesaler.

¹¹ *Possible Anticompetitive Barriers to E-Commerce: Wine*, Federal Trade Commission, July 2003 @ page 3. Report available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>

2. The Division will not know whether ID checks are being performed if reports are not required to be submitted.
3. The inclusion of the names, addresses, amounts, and dates of all shipments to persons in this state when requiring the direct shipper to maintain records may restrict what the Division can ask for when performing an audit, such as the signatures for age verification.
4. The bill does not address brand registrations required of the primary American source of supply in s. 545.045, F.S.
5. The major concern of this bill is the difficulty in estimating the costs and number of FTEs associated with the enforcement. If responsibility for checking ID rests with the common carrier, ID checking mechanisms and acceptable practices for checking ID are not described. If common carriers are not required to notify ABT of shipments of wine, ABT will not be able to ensure compliance with applicable law.
6. If a complaint alleges that wine was unlawfully delivered to underage persons at a residence, there is no authority for an ABT agent to enter a person's private dwelling to investigate. Any other complaint related to direct shipment of wine to a residence would pose the same statutory limitations on a sworn or non-sworn member of ABT.
7. The increase in excise tax collections could be offset by a corresponding decrease in taxable wine sales by Florida retailers. Regulation of out-of-state shippers will increase costs and difficulty of ensuring payment of appropriate taxes.
8. The bill may not eliminate the unequal treatment of in-state wineries and out-of-state wineries.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

The sponsor of this bill is expected to offer a strike-all amendment at the Business Regulation Committee meeting on February 7, 2006.

HB 247

2006

A bill to be entitled

An act relating to the Beverage Law; creating s. 561.585, F.S.; authorizing direct shipment of wine into this state for personal consumption or vendor resale; requiring licensure of direct shippers; providing eligibility requirements to be licensed; requiring recipient to be 21 years of age or older or a vendor licensed to sell alcoholic beverages for resale; requiring proof of age and signature of recipient; requiring monthly reports by direct shippers; requiring payment of taxes by direct shippers; providing for jurisdiction; providing administrative and criminal penalties; amending ss. 561.54 and 561.545, F.S., to conform to the provisions of s. 561.585, F.S.; amending s. 561.57, F.S.; including Internet sales as sales construed to be actually made at the vendor's licensed place of business; exempting common carriers from certain report filing requirements; requiring common carriers to verify the age of persons receiving shipments; providing a defense to certain actions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 561.585, Florida Statutes, is created to read:

561.585 Direct shipment of wine for personal consumption or vendor resale.--

(1) LICENSURE REQUIREMENTS.--

HB 247

2006

(a) Notwithstanding any provision of the Beverage Law or any rule to the contrary, a person, firm, corporation, or other entity that is licensed as a direct shipper under this section may ship wine directly to:

1. Any person who is at least 21 years of age, for personal use only and not for resale; or

2. Vendors licensed to sell alcoholic beverages for resale.

(b) To obtain a direct shipper's license, an applicant must:

1. Maintain a current license as a primary American source of supply as provided in s. 564.045.

2. Provide to the division a true copy of its current alcoholic beverage license issued by this state or another state.

3. Pay a registration fee in the amount of \$100.

(c) A direct shipper may annually renew its direct shipper's license with the division by providing to the division a true copy of its current alcoholic beverage license and paying a renewal fee in the amount of \$100.

(2) SIGNATURE.--Each direct shipper shall ensure that the outside shipping label on each package containing wine shipped under this section conspicuously states:

"SIGNATURE OF ADDRESSEE AGE 21 OR OLDER REQUIRED FOR DELIVERY."

56 and require, prior to delivery, that the signature of the
 57 addressee is obtained after presentation of a valid driver's
 58 license, an identification card issued by this state or another
 59 state of the United States, a passport, or a United States armed
 60 services identification card.

61 (3) MONTHLY REPORT.--Each direct shipper shall report
 62 monthly to the division the total amount of wine by type shipped
 63 into the state during the preceding month.

64 (4) TAXES.--Each direct shipper shall pay monthly to the
 65 Department of Revenue all sales taxes and to the division all
 66 Florida excise taxes due on sales to persons in this state for
 67 the preceding month. The amount of such taxes shall be
 68 calculated as if the sale took place at the location where the
 69 delivery occurred in this state. Each direct shipper shall
 70 maintain records of its direct shipments to this state,
 71 including the names, addresses, amounts, and dates of all
 72 shipments to persons in this state, and shall allow the
 73 Department of Revenue or the division, upon its request, to
 74 perform an audit of such records.

75 (5) JURISDICTION.--Each direct shipper is deemed to have
 76 consented to the jurisdiction of the division or any other state
 77 agency and the courts of this state concerning enforcement of
 78 this section and any related laws or rules.

79 (6) PENALTIES.--

80 (a) In addition to the penalties provided by s. 561.545,
 81 the division may suspend or revoke a direct shipper's license or
 82 impose fines on the direct shipper for any violation of this
 83 section.

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(b) A direct shipper who knowingly and intentionally ships, or causes to be shipped, wine to any person in this state who is younger than 21 years of age commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) Any common carrier or permit carrier or any operator of a privately owned car, truck, bus, or other conveyance who knowingly and intentionally transports wine from an out-of-state location directly to any person in this state who is younger than 21 years of age commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) A person who obtains wine from a direct shipper in violation of this section commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Section 2. Section 561.54, Florida Statutes, is amended to read:

561.54 Certain deliveries of beverages prohibited.--

(1) It is unlawful for common or permit carriers, operators of privately owned cars, trucks, buses, or other conveyances or out-of-state manufacturers or suppliers to make delivery from without the state of any alcoholic beverage to any person, association of persons, or corporation within the state, except to qualified manufacturers, distributors, and exporters of such beverages so delivered and to qualified bonded warehouses in this state.

(2) Any licensee aggrieved by a violation of this section may bring an action in any court of competent jurisdiction to recover for the state all moneys obtained by common carriers or

112 permit carriers; obtained by operators of privately owned cars,
113 trucks, buses, or other conveyances; or obtained by out-of-state
114 manufacturers or suppliers as a result of the delivery of
115 alcoholic beverages in violation of this section, and may obtain
116 a declaratory judgment that an act or practice violates this
117 section and enjoin any person from violating this section. In
118 addition to such relief, the court may order the confiscation
119 and destruction of any alcoholic beverages delivered in
120 violation of this section. In assessing damages, the court shall
121 enter judgment against a defendant for three times the amount of
122 the delivery charges proved or the fair market value of
123 merchandise unlawfully brought into the state. Payment or
124 satisfaction of any judgment under this section, other than for
125 costs and attorney's fees, shall be made in its entirety to the
126 state. In any successful action under this section, the court
127 shall award the plaintiff costs and reasonable attorney's fees.

128 (3) This section does not apply to the shipment of wine by
129 a licensed direct shipper to a person 21 years of age or older
130 or a vendor licensed to sell alcoholic beverages for resale in
131 accordance with s. 561.585.

132 Section 3. Section 561.545, Florida Statutes, is amended
133 to read:

134 561.545 Certain shipments of beverages prohibited;
135 penalties; exceptions.--The Legislature finds that the direct
136 shipment of alcoholic beverages by persons in the business of
137 selling alcoholic beverages to residents of this state in
138 violation of the Beverage Law poses a serious threat to the
139 public health, safety, and welfare; to state revenue

collections; and to the economy of the state. The Legislature further finds that the penalties for illegal direct shipment of alcoholic beverages to residents of this state should be made adequate to ensure compliance with the Beverage Law and that the measures provided for in this section are fully consistent with the powers conferred upon the state by the Twenty-first Amendment to the United States Constitution.

(1) Any person in the business of selling alcoholic beverages who knowingly and intentionally ships, or causes to be shipped, any alcoholic beverage from an out-of-state location directly to any person in this state who does not hold a valid manufacturer's or wholesaler's license or exporter's registration issued by the Division of Alcoholic Beverages and Tobacco or who is not a state-bonded warehouse is in violation of this section.

(2) Any common carrier or permit carrier or any operator of a privately owned car, truck, bus, or other conveyance who knowingly and intentionally transports any alcoholic beverage from an out-of-state location directly to any person in this state who does not hold a valid manufacturer's or wholesaler's license or exporter's registration or who is not a state-bonded warehouse is in violation of this section.

(3) Any person found by the division to be in violation of subsection (1) shall be issued a notice, by certified mail, to show cause why a cease and desist order should not be issued. Any person who violates subsection (1) within 2 years after receiving a cease and desist order or within 2 years after a prior conviction for violating subsection (1) commits a felony

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of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any common carrier or permit carrier, or any operator of a privately owned car, truck, bus, or other conveyance found by the division to be in violation of subsection (2) as a result of a second or subsequent delivery from the same source and location, within a 2-year period after the first delivery shall be issued a notice, by certified mail, to show cause why a cease and desist order should not be issued. Any person who violates subsection (2) within 2 years after receiving the cease and desist order or within 2 years after a prior conviction for violating subsection (2) commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) This section does not apply to:

(a) The direct shipment of sacramental alcoholic beverages to bona fide religious organizations as authorized by the division; ~~or to~~

(b) The possession of alcoholic beverages in accordance with s. 562.15(2); or

(c) The shipment of wine by a licensed direct shipper to a person 21 years of age or older or a vendor licensed to sell alcoholic beverages for resale in accordance with s. 561.585.

Section 4. Subsections (1) and (6) of section 561.57, Florida Statutes, are amended to read:

561.57 Deliveries by licensees.--

(1) Vendors shall be permitted to make deliveries away from their places of business of sales actually made at the licensed place of business; provided, telephone or mail orders

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received at vendor's licensed place of business shall be construed as a sale actually made at the vendor's licensed place of business. Nothing in this section shall prohibit Internet orders received at a vendor's licensed place of business from being construed as a sale actually made at the vendor's licensed place of business.

(6) Common carriers are not required to have vehicle permits to transport alcoholic beverages. Nothing in this section shall prohibit any common carrier or any licensee or other person utilizing a common carrier as his or her agent from making deliveries of alcoholic beverages within the state. Deliveries of alcoholic beverages by common carriers or by licensees or other persons utilizing common carriers as their agents under this section are exempt from the report filing requirements in s. 562.20. All common carriers acting as designated agents for delivery under this section shall verify that any person receiving alcoholic beverages is at least 21 years of age upon the delivery of such alcoholic beverages, as prescribed in division rules. The prescribed age verification shall give the common carrier and the licensee or other person hiring the common carrier a complete defense of selling, giving, or serving alcoholic beverages to any person under the age of 21.

Section 5. This act shall take effect upon becoming a law.

HB 247 – Summary of Strike-all Amendment by Representative Bogdanoff

This strike-all amendment creates a new s. 561.585, F.S., and the license and regulatory mechanism which allows the direct shipment of wine to any person that is at least 21 years of age for personal consumption; the amendment deletes the provision contained in the original bill allowing for direct shipments to vendors.

A “winery shipper” license may only be obtained by a wine manufacturer. The bill removes the authority for a Florida wine manufacturer to also be licensed as a distributor but grandfathers existing licensees and retains authority for certain wine manufacturers to hold retail licenses. To obtain a winery shipper license a winery applicant must:

- obtain and maintain licensure as a primary American source of supply;
- provide the division with a copy of its current wine manufacturer’s license issued by this or another state; [limits to wine manufacturers, not all alcoholic beverage licensees as in original bill]
- provide the division with a copy of its current Federal basic permit as a wine producer; [new requirement]
- manufacture less than 250,000 gallons of wine per year; [new requirement]
- pay a \$250 license fee; and [increased from \$100 fee]
- file a \$5,000 surety bond with the division. [new requirement]

The bill provides that a winery shipper license may not be issued to an applicant that is owned by a winery that produces more than 250,000 gallons of wine annually. According to industry estimates over 90 percent of wineries nationwide produce less than 250,000 gallons of wine annually. Winery shippers are prohibited from shipping more than 42 gallons of wine per year to a single address and recipients are prohibited from ordering more than 42 gallons of wine per year per address.

The criteria to become certified as a Florida Farm Winery was amended to require that at least 60 percent of all wine produced by the farm winery be made from Florida agricultural products. The bill allows the Commissioner of Agriculture to waive this requirement in times of hardship.

The strike-all amendment establishes additional labeling requirements for wine shipments. The winery shipper must ensure that the outside shipping label on each package is conspicuous and includes the following components, without specifying the format:

- that the package contains alcohol;
- that an adult signature is required; and
- that the recipient must be at least 21 years of age.

Responsibility is placed on both the winery shipper and the common carrier to ensure that the signature of a person that is at least 21 years of age is obtained prior to delivery of the direct-shipped wine. The approved forms of identification are expanded to include an

identification card issued under s. 322.051 or, if the person is physically handicapped as defined in s. 553.45(1).

The amendment clarifies administrative penalty provisions and allows for the suspension or revocation of a winery shipper license or the imposition of a fine in an amount up to \$2,500 per violation of newly created s. 561.585. Other penalty provisions in the strike-all amendment remain the same as in the original bill, except that the amendment increases the evidentiary standard for a person that obtains wine from a winery shipper in violation of the statute to *knowingly and intentionally*, which is the same standard applicable to a winery shipper or a common carrier.

The amendment provides the winery shipper and the common carrier with a complete defense to civil actions for the sale or delivery of alcoholic beverages to a person under the age of 21 if the prescribed age verification procedures were followed.

The amendment expands the monthly reporting requirements for winery shippers to provide greater specificity with regard to the wines shipped into the state and taxes paid. The amendment also exempts those licensees that already make monthly reports pursuant to s. 561.55, F.S., from duplicate reporting requirements if all relevant information is captured in other required reports.

The requirement for payment of excise and sales taxes remain in the strike-all amendment. Sales taxes are calculated as if the sale took place at the location where the delivery occurs in the state. A new provision is included to specify that the cost of performing an audit shall be assigned to the agency requesting the audit unless the licensee is found to be in material violation, at which time the cost of the audit will be assigned to the licensee.

The strike-all further amends s. 561.545, F.S., the primary direct shipping prohibition statute, to delete its applicability to wine and keep in place the direct shipping prohibitions with regard to beer and liquor. In-state retailers retain their ability to make direct deliveries of any type of alcoholic beverage.

The strike-all construes Internet orders as telephone orders made at a vendor's place of business and allows vendor delivery of same.

The strike-all amendment contains a severability clause and rulemaking authority for the division and the Department of Revenue.

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1
2 Section 1. Section 561.585, Florida Statutes, is created to
3 read:

4 561.585 Direct shipment of wine for personal consumption.--

5 (1) WINERY SHIPPER LICENSURE REQUIREMENTS.--

6 (a) Notwithstanding any provision of the Beverage Law or
7 any rule to the contrary, a person, firm, corporation, or other
8 entity that is licensed as a winery shipper under this section
9 may ship wine directly to any person who is at least 21 years of
10 age, for personal use only and not for resale. To obtain or
11 renew a winery shipper's license, an applicant must:

12 1. Obtain and maintain a current license as a primary
13 American source of supply as provided in s. 564.045.

14 2. Provide to the division a true copy of its current wine
15 manufacturer's license issued by this state or another state and
16 a true copy of its current Federal basic permit as a wine
17 producer issued in accordance with the Federal Alcohol
18 Administration Act.

19 3. Manufacture no more than 250,000 gallons of wine per
20 year.

21 4. Pay an annual license fee in the amount of \$250.

22 5. File with the division a surety bond acceptable to the
23 division in the sum of five thousand dollars as surety for the
24 payment of all taxes, provided that when in the discretion of the
25 division the amount of business done by the winery shipper is
26 such volume that a bond of less than five thousand dollars will
27 be adequate, the division may accept a bond in a lesser sum, but

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not less than one thousand dollars. The surety bond currently on
file with the division for a winery pursuant to s. 561.37 is
deemed to comply with this requirement. Any applicant that has a
surety bond for another license on file with the division that is
in excess of five thousand dollars shall be deemed to be in
compliance with this requirement

(b) The division shall not issue or renew a license under
this section if the applicant or licensee is owned by a winery
that manufactures more than 250,000 gallons of wine annually.

(c) Winery shipper licensees shall not ship or cause to be
shipped more than 42 gallons of wine per calendar year to a
single address.

(d) Recipients shall not purchase to be shipped more than
42 gallons of wine per calendar year to a single address.

(2) LABEL.--Each winery shipper licensee shall ensure that
the outside shipping label on each package is conspicuous and
includes the following components:

(a) This package contains alcohol,

(b) An adult signature is required, and

(c) The recipient must be at least 21 years of age.

(3) SIGNATURE.--

(a) Each winery shipper licensee and common carrier shall
require, prior to delivery, that the signature of the addressee
or other person at least 21 years of age is obtained after
presentation of a valid driver's license, an identification card
issued under the provisions of s. 322.051 or, if the person is
physically handicapped as defined in ²s. 553.45(1), a comparable
identification card issued by another state which indicates the

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56 person's age, a passport, or a United States Uniformed Services
57 identification card.

58 (b) A winery shipper licensee or common carrier who
59 violates this subsection shall have a complete defense to any
60 civil action therefor, except for any administrative action by
61 the division, if, at the time the alcoholic beverage was sold,
62 given, delivered, or transferred, the person falsely evidenced
63 that he or she was of legal age to purchase or consume the
64 alcoholic beverage and the appearance of the person was such that
65 an ordinarily prudent person would believe him or her to be of
66 legal age to purchase or consume the alcoholic beverage and if
67 the winery shipper licensee or common carrier carefully checked
68 one of the following forms of identification with respect to the
69 person: a driver's license, an identification card issued under
70 the provisions of s. 322.051 or, if the person is physically
71 handicapped as defined in ²s. 553.45(1), a comparable
72 identification card issued by another state which indicates the
73 person's age, a passport, or a United States Uniformed Services
74 identification card, and acted in good faith and in reliance upon
75 the representation and appearance of the person in the belief
76 that he or she was of legal age to purchase or consume the
77 alcoholic beverage.

78 (4) MONTHLY REPORT.—

79 (a) Each winery shipper licensee shall report monthly to
80 the division on forms prescribed by the division:

81 1. Whether any wine product was shipped into or within
82 this state under this section during the preceding month;

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83 2. The total amount of wine shipped into or within this
84 state under this section during the preceding month;

85 3. The quantity and types of wine shipped into or within
86 this state under this section during the preceding month; and

87 4. The amount of excise tax paid to the division for the
88 shipments of wine into or within this state under this section
89 during the preceding month.

90 (b) The report required by this subsection is not required
91 from a winery shipper licensee who files a monthly report
92 pursuant to s. 561.55 that contains all the information required
93 in paragraph (a). The division is authorized to prescribe the
94 format for submission of this information in order that duplicate
95 filings are eliminated.

96 (5) TAXES.—

97 (a) Each winery shipper licensee shall pay monthly to the
98 Department of Revenue all sales taxes and to the division all
99 Florida excise taxes due on sales to persons in this state for
100 the preceding month. The amount of such taxes shall be calculated
101 as if the sale took place at the location where the delivery
102 occurred in this state.

103 (b) Each winery shipper licensee shall maintain records of
104 its shipments into or within this state pursuant to this section,
105 including the names, addresses, amounts, and dates of all
106 shipments to persons in this state for at least three years after
107 date of delivery, and shall allow the Department of Revenue or
108 the division, upon its request, to perform an audit of such
109 records.

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110 (c) The cost of performing an audit under paragraph (b)
111 shall be assigned to the agency requesting the audit unless the
112 licensee is found to be in material violation of this subsection
113 in which case the cost of the audit shall be assigned to the
114 licensee.

115 (6) JURISDICTION.--Each winery shipper licensee is deemed
116 to have consented to the jurisdiction of the division or any
117 other state agency and the courts of this state concerning
118 enforcement of this section and any related laws or rules.

119 (7) PENALTIES.--

120 (a) In addition to any other penalty provided in the
121 Beverage Law, the division may suspend or revoke a winery shipper
122 license or impose fines in an amount not to exceed \$2,500 per
123 violation on the winery shipper licensee for any violation of
124 this section.

125 (b) A winery shipper that knowingly and intentionally
126 ships, or causes to be shipped, wine to any person in this state
127 who is under 21 years of age commits a felony of the third
128 degree, punishable as provided in s. 775.082, s. 775.083, or s.
129 775.084.

130 (c) Any common carrier, permit carrier, or other commercial
131 conveyance that knowingly and intentionally delivers wine
132 directly to any person in this state who is under 21 years of age
133 commits a felony of the third degree, punishable as provided in
134 s. 775.082, s. 775.083, or s. 775.084.

135 (d) A person that knowingly and intentionally obtains wine
136 from a winery shipper in violation of this section commits a

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137 misdemeanor of the second degree, punishable as provided in s.
138 775.082 or s. 775.083.

139 Section 2. Section 561.54, Florida Statutes, is amended to
140 read:

141 561.54 Certain deliveries of beverages prohibited.--

142 (1) It is unlawful for common or permit carriers, operators
143 of privately owned cars, trucks, buses, or other conveyances or
144 out-of-state manufacturers or suppliers to make delivery from
145 without the state of any alcoholic beverage to any person,
146 association of persons, or corporation within the state, except
147 to qualified manufacturers, distributors, and exporters of such
148 beverages so delivered and to qualified bonded warehouses in this
149 state.

150 (2) Any licensee ~~aggrieved by a violation of this section~~
151 may bring an action in any court of competent jurisdiction to
152 recover for the state all moneys obtained by common carriers or
153 permit carriers; obtained by operators of privately owned cars,
154 trucks, buses, or other conveyances; or obtained by out-of-state
155 manufacturers or suppliers as a result of the delivery of
156 alcoholic beverages in violation of this section, and may obtain
157 a declaratory judgment that an act or practice violates this
158 section and enjoin any person from violating this section. In
159 addition to such relief, the court may order the confiscation and
160 destruction of any alcoholic beverages delivered in violation of
161 this section. In assessing damages, the court shall enter
162 judgment against a defendant for three times the amount of the
163 delivery charges proved or the fair market value of merchandise
164 unlawfully brought into the state. Payment or satisfaction of any

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judgment under this section, other than for costs and attorney's fees, shall be made in its entirety to the state. In any successful action under this section, the court shall award the plaintiff costs and reasonable attorney's fees.

(3) This section does not apply to the shipment of wine by a licensed winery shipper to a person 21 years of age or older in accordance with s. 561.585.

Section 3. Section 561.545, Florida Statutes, is amended to read:

561.545 Certain shipments of beverages prohibited; penalties; exceptions.-- The Legislature finds that the direct shipment of alcoholic beverages by persons in the business of selling ~~alcoholic~~ malt or spirituous beverages to residents of this state in violation of the Beverage Law poses a serious threat to the public health, safety, and welfare; to state revenue collections; and to the economy of the state. The Legislature further finds that the penalties for illegal direct shipment of ~~alcoholic~~ malt or spirituous beverages to residents of this state should be made adequate to ensure compliance with the Beverage Law and that the measure provided for in this section are fully consistent with the powers conferred upon the state by the Twenty-First Amendment to the United States Constitution.

(1) Any person in the business of selling ~~alcoholic~~ malt or spirituous beverages who knowingly and intentionally ships, or causes to be shipped, any ~~alcoholic~~ malt or spirituous beverages from an out-of-state location directly to any person in this state who does not hold a valid manufacturer's or wholesaler's

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193 license or exporter's registration issued by the Division of
194 Alcoholic Beverages and Tobacco or who is not a state-bonded
195 warehouse is in violation of this section.

196 (2) Any common carrier or permit carrier or any operator of
197 a privately owned car, truck, bus or other conveyance who
198 knowingly and intentionally transports any ~~alcoholic~~ malt or
199 spirituous beverages from an out-of-state location directly to
200 any person in this state who does not hold a valid manufacturer's
201 or wholesalers license or exporter's registration or who is not a
202 state-bonded warehouse is in violation of this section.

203 (3) Any person found by the division to be in violation of
204 subsection (1) shall be issued a notice, by certified mail, to
205 show cause why a cease and desist order should not be issued. Any
206 person who violates subsection (1) within 2 years after receiving
207 a cease and desist order or within 2 years after a prior
208 conviction for violating subsection (1) commits a felony of the
209 third degree, punishable as provided in s. 775.082, s. 775.083,
210 or s. 775.084.

211 (4) Any common carrier or permit carrier, or any operator
212 of a privately owned car, truck, bus, or other conveyance found
213 by the division to be in violation of subsection (2) as a result
214 of a second or subsequent delivery from the same source and
215 location, within a 2-year period after the first delivery shall
216 be issued a notice, by certified mail, to show cause why a cease
217 and desist order should not be issued. Any person who violates
218 subsection (2) within 2 years after receiving the cease and
219 desist order or within 2 years after a prior conviction for

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violating subsection (2) commits a felony of the third degree,
punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) This section does not apply to:

(a) The direct shipment of sacramental alcoholic beverages
to bona fide religious organizations as authorized by the
division; ~~or to~~

(b) The possession of alcoholic beverages in accordance
with s. 562.15(2); or

(c) The direct shipment of wine in accordance with s.
561.585.

Section 4. Subsections (1) and (6) of section 561.57,
Florida Statutes, are amended to read:

561.57 Deliveries by licensees.--

(1) Vendors shall be permitted to make deliveries away from
their places of business of sales actually made at the licensed
place of business; provided, telephone or mail orders received at
vendor's licensed place of business shall be construed as a sale
actually made at the vendor's licensed place of business. For
purposes of this section Internet orders shall be construed as
telephone orders.

(6) Common carriers are not required to have vehicle
permits to transport alcoholic beverages. Nothing in this section
shall prohibit any common carrier or any licensee or other person
utilizing a common carrier as his or her agent from making
deliveries of alcoholic beverages within the state. Deliveries of
alcoholic beverages by common carriers or by licensees or other
persons utilizing common carriers as their agents under this
section are exempt from the report filing requirements in s.

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248 562.20. All common carriers acting as designated agents for
249 delivery under this section shall verify that any person
250 receiving alcoholic beverages is at least 21 years of age upon
251 the delivery of such alcoholic beverages, as prescribed in
252 division rules. Compliance with the prescribed age verification
253 measures in 561.585(3) shall give the common carrier and the
254 licensee or other person hiring the common carrier a complete
255 defense of selling, giving, delivering or transferring alcoholic
256 beverages to any person under the age of 21.

257 Section 5. Section 599.004, Florida Statutes, is amended to
258 read:

259 (1) The Florida Farm Winery Program is established within
260 the Department of Agriculture and Consumer Services. Under this
261 program, a winery may qualify as a tourist attraction only if it
262 is registered with and certified by the department as a Florida
263 Farm Winery. A winery may not claim to be certified unless it has
264 received written approval from the department.

265 (a) To qualify as a certified Florida Farm Winery, a winery
266 shall meet the following standards:

267 1. Produce or sell less than 250,000 gallons of wine
268 annually. of which 60% of wine produced shall be made from
269 Florida agricultural products. The Commissioner of Agriculture
270 may waive this requirement in times of hardship.

271 2. Maintain a minimum of 10 acres of owned or managed
272 vineyards in Florida.

273 3. Be open to the public for tours, tastings, and sales at
274 least 30 hours each week.

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4. Make annual application to the department for recognition as a Florida Farm Winery, on forms provided by the department.

Section 6. Subsection (5) of Section 561.24, Florida Statutes, is amended to read:

(5) Notwithstanding any of the provisions of the foregoing subsections, any corporation which holds a license as a distributor on June 3, 1947, shall be entitled to a renewal thereof, provided such corporation complies with all of the provisions of the Beverage Law of Florida, as amended, and of this section and establishes by satisfactory evidence to the division that, during the 6-month period next preceding its application for such renewal, of the total volume of its sales of spirituous liquors, in either dollars or quantity, not more than 40 percent of such spirituous liquors sold by it, in either dollars or quantity, were manufactured, rectified, or distilled by any corporation with which the applicant is affiliated, directly or indirectly, including any corporation which owns or controls in any way any stock in the applicant corporation or any corporation which is a subsidiary or affiliate of the corporation so owning stock in the applicant corporation. Any manufacturer of wine holding a license as a distributor on July 1, 2006 ~~the effective date of this act~~ shall be entitled to a renewal of such license notwithstanding the provisions of subsections (1)-(5). ~~This section does not apply to any winery qualifying as a certified Florida Farm Winery under s. 599.004.~~

Section 7. SEVERABILITY.-- Should any portion of this chapter be held unconstitutional, it is the intent of the

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303 legislature that the courts disturb only as much of the
304 regulatory system of this state as is necessary to enforce the
305 United States Constitution.

306 Section 8. RULEMAKING.-- The division and the Department of
307 Revenue may adopt rules pursuant to ss. 120.536(1) and 120.54 to
308 implement and administer this act.

309 Section 9. This act shall take effect upon becoming a law.

310

311